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No. 01-729

Supreme Court, U.S.
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In The
Supreme Court of the United States

GLENN G. GODFREY AND BRUCE M. BOTELHO,

Petitioners,

v.

JOHN DOE I, JANE DOE, AND JOHN DOE II,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE ALASKA CIVIL LIBERTIES UNION, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The Alaska Civil Liberties Union is one of its state affiliates. The ACLU and its affiliate maintain a strong and abiding interest in defending fundamental civil liberties from unconstitutional and unwarranted governmental intrusion.

This case raises constitutional issues of critical importance to the ACLU and its members, including the proper meaning of the Ex Post Facto Clause and the distinction between civil regulation and punishment. In furtherance of its organizational views on these matters, the ACLU has often appeared before this Court, both as direct counsel and as *amicus curiae*. *See, e.g., Kansas v. Hendricks*, 521 U.S. 343 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *United States v. Salerno*, 481 U.S. 739 (1987).

In addition, the ACLU and its affiliates have served, and continue to serve, as direct counsel and *amici* in constitutional challenges to state sex offender and registration laws similar to the Alaska law at issue in this case. *See, e.g., Connecticut Dep't of Pub. Safety v. Doe*, 271 F.3d 38 (2d Cir. 2001), *cert. granted*, 122 S. Ct. 1959, 70 U.S.L.W. 3561 (May 20, 2002) (No. 01-1231); *Russell v.*

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[1] All parties have consented to the appearance of *amici curiae* in this matter, and letters of consent have been lodged with the Clerk of the Court. Pursuant to Sup. Ct. R. 37.6, counsel for *amici* state that this brief was not authored in any part by counsel for any party. No person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation and submission of this brief.

Gregoire, 124 F.3d 1079 (9th Cir. 1997); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997); *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997); *A.A. v. New Jersey*, 176 F. Supp. 2d 274 (D.N.J. 2001); *Doe v. Williams*, 167 F. Supp. 2d 45 (D.D.C. 2001), *appeal held in abeyance pending this Court's decision in Connecticut v. Department of Public Safety*, 2002 WL 1298752 (D.C. Cir. June 12, 2002).

The National Association of Criminal Defense Lawyers ("NACDL") is a nationwide, non-profit voluntary association of criminal defense lawyers founded in 1958 to improve the quality of representation of the accused and to advocate for the preservation of constitutional rights in criminal cases. The NACDL has a membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The NACDL has filed briefs in many cases before the Court involving the distinction between civil regulation and punishment. *See, e.g., Kansas v. Crane*, 534 U.S. 407 (2002); *Kansas v. Hendricks*, 521 U.S. 343 (1997); *Hudson v. United States*, 522 U.S. 93 (1997); *United States v. Ursery*, 518 U.S. 267 (1996).

Amici file this brief to urge the Court to affirm the decision of the United States Court of Appeals for the Ninth Circuit holding that Alaska's sex offender registration and community notification law ("ASORA") violates the Ex Post Facto Clause as applied to those who committed their crimes before it was enacted. And in so doing, *amici* urge the Court to clarify its Ex Post Facto jurisprudence in a manner consistent with the Clause's historical purpose of protecting against arbitrary and vindictive legislation targeted at society's least-favored persons.

STATEMENT OF THE CASE

In this case, the Court will review for the first time the constitutionality of a state's sex offender registration and notification law. Commonly known as "Megan's Laws," for Megan Kanka, the seven-year-old New Jersey girl whose murder in 1994 by a convicted sex offender prompted the enactment of New Jersey's sex offender registration and notification law, these laws typically require persons who have been convicted of a sex offense, upon their release from custody, to provide the police with such identifying information as their home addresses, a recent photograph, and criminal histories. The laws then authorize the police to disclose this information to members of the public. All fifty states and the District of Columbia have enacted Megan's Laws. *See* United States Department of Justice, Center for Sex Offender Management, *Community Notification and Education* (Apr. 2001) at 4, *available at* www.csom.org.

Pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994 ("Wetterling Act"), 42 U.S.C. § 14071, the states are required as a condition of receiving certain federal law enforcement funds to implement a version of Megan's Law that meets certain minimum requirements. For example, the Wetterling Act sets a floor for the types of offenders who must be subject to registration, requiring that all those convicted of a criminal sex offense against a minor, and all persons convicted of a sexually violent offense, be included in states' registries. 42 U.S.C. § 14071(a)(1). In addition, the Wetterling Act requires, at a minimum, that offenders provide the police with current addresses, fingerprints, and photographs. 42 U.S.C. § 14071(b)(1). The Wetterling Act also sets minimum requirements for the frequency and duration of registration. While the

majority of offenders must be required to verify their addresses annually, those deemed "sexually violent predators" – *i.e.*, those convicted of a sexually violent offense who suffer from a mental abnormality or disorder that makes them likely to engage in predatory sexually violent offenses, 42 U.S.C. § 14071(a)(3)(C) – must verify their addresses quarterly. *Id.* at § 14071(b)(3). Furthermore, offenders generally must remain registered for a minimum of ten years; those who have been convicted of an aggravated sexual offense, more than one covered offense, or who are sexually violent predators must register for life. *Id.* at § 14071(b)(6). Finally, the Wetterling Act sets minimum requirements for the extent of community notification, requiring states to "release relevant information that is necessary to protect the public concerning a specific person required to register." *Id.* at § 14071(e)(2).

Thus, the Wetterling Act affords the states considerable discretion in designing their registration and notification laws. For example, the states may expand the range of offenses that subject persons to registration and notification, the types of information required to be disclosed, and the duration of the registration requirement. The states also have discretion to determine how and to what extent they will disclose the information contained in the registry as "necessary to protect the public." *Id.* at § 14071(e)(2). Consistent with that discretion, the states have enacted laws that differ as to each of these elements. *See Community Notification and Education* at 4-9; Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. Crim. L. & Criminology 1167, 1175 (1999).

Alaska's sex offender registration and notification act ("ASORA" or "the Alaska law") is at the extreme of states' registration and notification laws in every respect. For

example, Alaska subjects to its registration and notification laws not only those persons who have committed the offenses specified in the Wetterling Act, but also those who have committed less serious offenses such as indecent exposure. Alaska Stat. § 12.63.100. It also imposes a minimum 15 years' reporting requirement, five years more than the minimum required by the Wetterling Act. *Id.* at § 12.63.010(d)(1). In addition, Alaska requires offenders to disclose, and makes available to the public, information not enumerated in the Wetterling Act, such as date of birth, work address, and motor vehicle information. *Id.* at § 12.63.010. There is no effort to distinguish between individuals who may pose a risk of future dangerousness and those who do not. Under Alaska law, all persons covered by the Act must provide the required information. There is then no restriction on the use of the information once it is submitted to the registry: ASORA's implementing regulations expressly provide that the information is available "for any purpose, to any person." Alaska Admin. Code. tit. 13 § 09.050(a) (2000).

Indeed, to facilitate its scheme of unlimited notification, Alaska has chosen to post its sex offender registry on the Internet without any restrictions. Thus, anyone in the world who has access to the Internet may view the information contained in Alaska's sex offender registry, without even so much as submitting to the State a request to do so. The Internet site can be searched "by name, partial address, zip code or city," and "includes the offender's name, color photograph, physical description, street address, employer address and conviction information, all under the banner 'Registered Sex Offender.'" *Doe v. Otte*, 259 F.3d 979, 984 (9th Cir. 2001).

Upon passage of the ASORA, respondents John Doe I and John Doe II, both of whom were required to register under the law, brought an action under 42 U.S.C. § 1983 to

enjoin its enforcement, asserting among other claims that the law violated the Ex Post Facto Clause. In 1985, nine years before the ASORA was enacted, John Doe I had entered a plea of nolo contendere to a charge of sexual abuse of a minor after a court determined that he had sexually abused his daughter. He was sentenced to twelve years' imprisonment. After being released in 1990, Doe I was granted custody of his daughter, based upon a court's determination that he was rehabilitated. In 1985, John Doe II entered a plea of nolo contendere to one count of sexual abuse of a 14-year old child. He was sentenced to eight years' imprisonment. Upon his release in 1990, Doe II completed a two-year program for the treatment of sex offenders. *Id.* at 983.

The district court granted summary judgment in favor of the State, and the Does appealed. In an opinion filed on April 9, 2001, and amended on July 24, 2001 and August 9, 2001, the United States Court of Appeals for the Ninth Circuit reversed, holding that the retroactive application of the Alaska law violates the Ex Post Facto Clause.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Ninth Circuit correctly applied this Court's precedents to hold that the application of Alaska's sex offender registration and notification law to the respondents violates the Ex Post Facto Clause of the United States Constitution. Specifically, the Ninth Circuit correctly determined that the respondents had established, by the "clearest proof," pursuant to *Fleming v. Nestor*, 363 U.S. 603 (1960), and *Hudson v. United States*, 522 U.S. 93 (1997), that the law was punitive notwithstanding the legislature's attempt to characterize it as civil. In so holding, the Ninth Circuit

appropriately treated the legislature's expressed remedial intent not as "near-controlling," as urged by the State, but as a rebuttable presumption that was overcome by significant indicia of a punitive intent or effect.

In finding that presumption overcome, the Court of Appeals correctly found that four of the seven factors articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), weighed in favor of finding the law punitive. The court attached particular significance to the seventh factor, the statute's excessiveness in relation to its non-punitive purpose. For the reasons set forth below, the court was correct to do so, in light of the historical concerns of the Ex Post Facto Clause and this Court's analysis in its seminal ex post facto cases. Although this factor alone would not necessarily be sufficient to warrant a finding that the law is punitive, when combined with the three other factors that weigh in favor of a punitive effect, it amply justifies the conclusion that the ASORA is punitive. Accordingly, the statute may not, consistent with the Ex Post Facto Clause, be applied retroactively to those whose crimes predate its enactment.

ARGUMENT

THE NINTH CIRCUIT CORRECTLY DETERMINED THAT THE ALASKA LAW IS PUNITIVE FOR PURPOSES OF THE EX POST FACTO CLAUSE, NOTWITHSTANDING THE LEGISLATURE'S ATTEMPT TO CHARACTERIZE IT AS CIVIL.

In analyzing the respondents' claim that the Alaska law violates the Ex Post Facto Clause, the Ninth Circuit applied the two-part "intent-effects" test that this Court has established for determining whether a measure

imposes "punishment" for purposes of triggering the protections of the Fifth and Sixth Amendments and, recently, the Ex Post Facto Clause. *See, e.g., Hudson v. United States*, 522 U.S. 93, 99 (1997) (Double Jeopardy Clause of Fifth Amendment); *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (Double Jeopardy and Ex Post Facto Clauses); *Allen v. Illinois*, 478 U.S. 364, 368-369 (1986) (Self-Incrimination Clause of Fifth Amendment); *United States v. Ward*, 448 U.S. 242, 248-49 (1980) (Fifth and Sixth Amendments generally). Pursuant to this test, the Court "must initially ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Hendricks*, 521 U.S. at 361. This inquiry asks whether the legislature either "expressly or impliedly" indicated a preference for a civil or criminal label. *Ward*, 488 U.S. at 248.

If the legislature indicates a preference for a criminal label, then the inquiry is at an end and the pertinent protections of the Constitution apply. However, if the legislature indicates a preference for a civil label, then the Court must proceed to the second part of the inquiry. Under this second prong, the Court must determine whether the measure is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Hendricks*, 521 U.S. at 361 (quoting *Ward*, 448 U.S. at 248-249).

In performing the assessment required under the second step of the "intent-effects" test, the Court has directed that the seven factors catalogued in *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-169, and culled from cases addressing whether a law is "punishment" for purposes of the Fifth, Sixth, and Eighth Amendments, and the constitutional prohibition against bills of attainder and ex post facto laws, should be taken into account. *See Kennedy*, 372 U.S. at 168 and nn. 22-28. These are:

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment – retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

Hudson, 522 U.S. at 99 (quoting *Kennedy*, 372 U.S. at 168-69). Although the Court has repeatedly characterized these factors as only "useful guideposts," which are neither "exclusive nor dispositive," *Ward*, 448 U.S. at 249, and has recognized that the factors "'often point in differing directions,'" *Hudson*, 522 U.S. at 101 (quoting *Kennedy*, 372 U.S. at 169), it has not provided guidance as to the relative weight to be afforded to each of the factors. The Court has advised, however, that no one factor is determinative. *Hudson*, 522 U.S. at 101. It has further advised that the legislature's characterization of a measure as civil will only be overcome by the "clearest proof" that the measure is in fact punitive. *Hendricks*, 521 U.S. at 361; *Ward*, 448 U.S. at 242; *Fleming*, 363 U.S. at 603.

In this case, the Ninth Circuit found that the Alaska legislature had expressed a preference for a civil label for the ASORA and that the legislature acted with a non-punitive intent. *Doe*, 259 F.3d at 986. Nevertheless, applying the *Kennedy* factors, the court found the "clearest proof" that the measure was punitive. Specifically, the court determined that four out of seven of the *Kennedy* factors weighed in favor of finding the measure punitive: that the measure imposed an affirmative disability or

restraint; that it furthered the traditional aims of punishment, retribution and deterrence; that it applied to behavior that was already a crime; and that it was excessive in relation to the alternative purposes assigned, public safety. *See Doe*, 259 F.3d at 987-992. The court of appeals afforded particular significance to the last factor, the excessiveness of the measure. Taking these four factors together, the court of appeals held that they outweighed the three factors pointing toward a non-punitive effect and provided the "clearest proof" necessary to overcome the legislature's stated remedial intent. For the reasons set forth below, the Ninth Circuit's decision should be affirmed.

I. CONSISTENT WITH ITS HISTORICAL FUNCTION OF PROTECTING AGAINST ARBITRARY AND VINDICTIVE LEGISLATION, THE EX POST FACTO CLAUSE REQUIRES MEANINGFUL SCRUTINY OF LEGISLATIVE ACTION.

The State quarrels with the standard of proof applied by the court of appeals in its consideration of whether the legislature's characterization of the measure as remedial was overcome. Specifically, the State contends that, although the Ninth Circuit identified the correct standard – "the clearest proof" – it erred in its application of that standard, by failing to treat the legislature's stated intent as "near-controlling." State's Br. at 20. Pointing out that this Court has "*never* found a law enacted with non-punitive intent to violate the Ex Post Facto Clause in light of the *Mendoza-Martinez* factors," State's Br. at 32, 2, the State argues that the "clearest proof" of a punitive effect will almost never exist, and was not established in this case. State's Br. at 22 ("once it is determined that the legislature intended a civil goal, the ex post facto inquiry

is at an end – except in those truly exceptional circumstances where there is the clearest proof that the legislature's expressed purpose is just a charade for punitive goals"). The State is wrong.

A. The Court Has Never Applied the "Clearest Proof" Standard in the Manner Advanced by the State.

The State's characterization of the legislature's stated intent as "near-controlling" misconstrues the "clearest proof" standard. The phrase, which traces back to the Court's decision in *Fleming v. Nestor*, 363 U.S. 603, 617 (1960), does not create a "near-controlling" presumption that a statute is remedial. Rather, it simply restates the usual rule that statutes are entitled to a presumption of constitutionality, and that mere conjecture as to illicit motives is not sufficient to overcome that presumption. *See E.B. v. Verniero*, 119 F.3d 1077, 1128 (3d Cir. 1997) (Becker, J., dissenting) (noting that presumption is "consistent with familiar canons of statutory interpretation and constitutional adjudication stating that legislatures are rational bodies that intend to function within their powers to enact lawful measures").

Although the State relies on the Court's never having found the "clearest proof" standard met as evidence of the standard's rigor, in fact the Court has not applied the "clearest proof" standard in a manner consistent with the State's characterization of it here. *See Hudson*, 522 U.S. at 115 (Breyer, J., concurring) (explaining that the limitation suggested by the "clearest proof" language is "misleading," and "is not consistent with what the Court has actually done"). To the contrary, each time the Court has invoked the "clearest proof" standard, it has "simply applied factors of the *Kennedy* variety to the matter at hand," *id.*,

and found that these factors did not persuasively demonstrate a punitive intent or effect. Thus, the Court has yet to decide a case in which, on account of the "clearest proof" standard, it held non-punitive a measure for which there were significant objective indicators of a punitive intent or effect.

For example, in *Fleming*, the first case to mention a "clearest proof" standard, the Court found *no* objective indications of a punitive intent. At issue in *Fleming* were amendments to the Social Security Act which terminated benefits to the vast majority of aliens deported. Nestor, who was deported on account of his past membership in the Communist Party, argued that the termination of his benefits violated the Ex Post Facto and Bill of Attainder Clauses. Examining the statute's language and structure, and the nature of the deprivation imposed, the Court found no evidence of a punitive design. 363 U.S. at 616-17. However, urged by Nestor to look to the statute's legislative history for evidence of a purpose to punish those who were members of the Communist Party, the Court warned that "slight implication" and "vague conjecture" would not be sufficient. *Id.* at 617. It was in this context – warning of the "dubious" nature of "[j]udicial inquiries into Congressional motives" – that the Court stated that "only the clearest proof would suffice to establish the unconstitutionality of a statute" on the grounds of illicit legislative motives. *Id.* When the Court finally considered the legislative history of the Social Security Act modifications, it found *no* support for Nestor's claim that they were intended to reach persons, like him, based upon past membership in the Communist Party. *Id.* at 619. Thus, *Fleming* provides no support for the State's assertion that even strong proof of a punitive intent or effect should be essentially ignored whenever the State chooses to attach a civil label to one of its laws.

Similarly, in each case since *Fleming* invoking the "clearest proof" standard, the Court has found little evidence of a punitive intent or effect. In two cases, the Court found that two of the *Kennedy* factors provided mild support for a punitive intent or effect. *See Hudson*, 522 U.S. at 104 (civil fines applied to conduct that was also criminal and served some deterrent purpose); *United States v. Ursery*, 518 U.S. 267, 292 (1996) (same as to civil forfeiture sanctions). In the remaining decisions, the Court found that one or no factors provided such support. *See Kansas v. Hendricks*, 521 U.S. 346, 361-63 (1997) (one factor: civil confinement imposed "affirmative disability or restraint"); *Allen v. Illinois*, 478 U.S. 364, 269 (1986) (no factors weighed in favor of finding civil contempt provisions punitive); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984) (one factor: civil forfeiture sanctions applied to behavior that was already a crime); *United States v. Ward*, 448 U.S. 242, 250 (1980) (same as to civil fine).[2] Accordingly, the "clearest proof"

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[2] In two additional cases, the Court also found little evidence to establish the "clearest proof" of a punitive intent or effect, although it did not express its decision in terms of the *Kennedy* factors. In *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961), the Court considered whether provisions of the Subversive Activities Control Act requiring "Communist-action organizations" to register with the Government imposed an unconstitutional Bill of Attainder. The Court found no evidence that the provisions were not, as they appeared to be on their face, intended to regulate "designated activities" rather than specific persons or organizations. 367 U.S. at 83-86. Similarly, in *Hicks v. Feiock*, 485 U.S. 624 (1988), the Court remanded for further proceedings to determine whether contempt proceedings against a father for failure to pay child support were civil or criminal. Addressing at the outset the father's contention that they were criminal, the Court stated that "one who challenges the State's classification of the relief imposed as 'civil' or 'criminal' may be required to show 'the clearest proof' that it is not correct as a matter of

(Continued on following page)

standard has never actually been applied in a case where there was substantial evidence pointing toward a punitive intent or effect. There is, therefore, nothing in this Court's past cases to suggest that the standard was designed to be the nearly insurmountable hurdle depicted by the State, as opposed to a restatement of the usual presumption of constitutionality to which statutes are entitled.[3]

B. The Deference Urged By the State is Inconsistent with the History and Purpose of the Ex Post Facto Clause.

The "near-controlling" deference urged by the State is not only inconsistent with what the Court has actually done in prior cases, it is also inconsistent with the historical purpose of the Ex Post Facto Clause which was to "prevent[] legislative abuses" like "arbitrary or vindictive lawmaking." *Miller v. Florida*, 482 U.S. 423, 429 (1987). *See also Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) (stating that the Ex Post Facto Clause checks the "violent

federal law." *Id.* at 631 (citing *Allen v. Illinois*, 478 U.S. 364, 368-69 (1986)). The Court continued, however, "[n]onetheless, if such a challenge is substantiated, then the labels affixed either to the proceeding or to the relief imposed under state law are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law." *Id.*

[3] That the Court did not intend in *Fleming* to announce a new, more rigorous standard for proving claims under the Ex Post Facto Clause is underscored by the fact that in another case arising under the Ex Post Facto and Bill of Attainder Clauses decided just two weeks before *Fleming*, *De Veau v. Braisted*, 363 U.S. 144 (1960), the Court made no mention of a "clearest proof" standard. Moreover, the language of *Fleming* does not reveal an intention to create a new, higher standard of proof or to depart from the traditional Ex Post Facto or Bill of Attainder analysis.

acts which might grow out of the feelings of the moment"); James Madison, *The Federalist* No. 44 at 282 (Clinton Rossiter ed. 1961) ("Ex Post Facto laws . . . are contrary to the first principles of the socia' compact, and to every principle of sound legislation."); Alexander Hamilton, *The Federalist* No. 84 at 511 (Clinton Rossiter ed. 1961) (characterizing the bar against Ex Post Facto laws as among the three "greate[st] securities to liberty and republicanism" in the Constitution); Breck P. McAllister, *Ex Post Facto Laws in the Supreme Court of the United States*, 15 Cal. L. Rev. 269, 269 (1927).

The basis for the Framers' hostility to ex post facto laws was two-fold. First, the Framers knew from experience that ex post facto laws were unfair "because they deprive citizens of notice of wrongfulness of behavior, and thus result in unjust deprivations." Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 Am. Crim. L. Rev. 1261, 1276 (1998). Second, the Framers knew that ex post facto laws frequently were the product of "arbitrary and vindictive lawmaking." *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (citing cases). As Chief Justice Marshall explained in *Calder v. Bull*, 3 Dall. 386 (1798), the Court's seminal case on the Ex Post Facto Clause:

> The prohibition against [the states'] making any ex post facto laws . . . very probably arose from the knowledge that the Parliament of Great Britain claimed and exercised a power to pass such laws. . . . With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such, and similar, acts of violence and injustice, I believe, the Federal and State Legislatures, were prohibited from passing any bill of attainder; or any ex post facto law.

3 Dall. at 389.

Consistent with the constitutional function of the Ex Post Facto Clause as a check against arbitrary and vindictive lawmaking, the Court has historically approached legislation challenged under the Ex Post Facto Clause with skepticism rather than deference. As the second Justice Harlan commented, "the policy of the prohibition against ex post facto legislation would seem to rest on the apprehension that the legislature in imposing penalties on past conduct . . . may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons." *James v. United States*, 366 U.S. 213, 247 n.3 (1961) (Harlan, J., concurring in part and dissenting in part). *See also California Dep't of Corrections v. Morales*, 514 U.S. 499, 522 (1995) (Stevens, J., dissenting) (the "concerns that animate the Ex Post Facto Clause demand enhanced, and not . . . reduced, judicial scrutiny."); Hamilton, *The Federalist* No. 78 at 466 (Clinton Rossiter ed. 1961) (limitations on the legislative authority such as the Ex Post Facto Clause "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void").

Accordingly, the "near-controlling" deference urged by the State to the legislature's characterization of a measure as civil is unsupported by what the Court has actually done in prior cases applying the "clearest proof" standard, and inconsistent with this Court's traditional approach in ex post facto cases. Indeed, to adopt such a deferential position would be to break faith with the historical role of the Ex Post Facto Clause as an important guardian against arbitrary and vindictive legislation. The court of appeals therefore did not err in its application of the "clearest proof" standard, but applied that standard in a

manner consistent with its prior application by this Court and the purposes of the Ex Post Facto Clause.

II. CONSIDERATION OF THE *KENNEDY* FACTORS DEMONSTRATES THAT THE ALASKA LAW IS PUNITIVE.

The seven factors set forth in *Kennedy v. Mendoza-Martinez* give shape and content to the "clearest proof" standard. They assume that a court will give appropriate respect to a legislature's characterization of a challenged law as civil, but not blind deference to what can on occasion be a self-serving label. They also provide a framework designed to guide a court through a careful assessment of a law's actual purpose and effect.

Here, a majority of the *Kennedy* factors support the conclusion that the ASORA has a predominantly punitive effect and therefore violates the Ex Post Facto Clause. In reaching that conclusion, however, the court of appeals did not engage in a mere arithmetical exercise. Instead, it properly recognized that the relative weight assigned to each of the *Kennedy* factors must necessarily be determined by the history and purpose of the Ex Post Facto Clause. *Doe*, 259 F.3d at 944 n.12. The ASORA is unconstitutional, then, not only because it fails under most of the *Kennedy* factors, but because it fails under the most important.

A. The Majority, and the Most Important, of the *Kennedy* Factors Weigh in Favor of Finding the Alaska Law Punitive.

1. The Law Imposes an Affirmative Disability or Restraint.

First, the law imposes an "affirmative disability or restraint." The Ninth Circuit found that both the registration and notification aspects of the law contributed to the disability: the registration provisions because of their onerous reporting requirements, and the notification provisions because they were likely to render respondents "completely unemployable," and subject them to "worldwide obloquy and ostracism." *Id.* at 988, 994. The Ninth Circuit's conclusions as to the registration provisions turned in part on its understanding that registrants were required to report to police stations in person to fulfill their reporting obligations, *id.* at 987 – a fact that the State vigorously disputes, even as it acknowledges responsibility for the Ninth Circuit's understanding. State's Br. at 39.

Regardless of whether the reporting must be done in person or not, the ASORA's registration requirements plainly restrain respondents' liberty. Respondents are not free to go about their lives as they choose, *contra* State's Br. at 38, but must report to the police on a quarterly or annual basis, more frequently if they change jobs or their residence, for a minimum of fifteen years. Alaska Stat. § 12.63.010. Failure to comply with these requirements is a criminal offense. Thus, by any reasonable interpretation of the term, respondents are subject to a "restraint" upon their liberty.

Even more significant, however, are the effects of the ASORA's notification provisions. By disclosing offenders' work addresses – a detail not required by the Wetterling

Act, *see supra* at 3 – the law "creates a substantial probability that registrants will not be able to find work, because employers will not want to risk loss of business when the public learns that they have hired sex offenders." *Doe*, 259 F.3d at 988. As the Supreme Court of Kansas observed in considering a similar notification law, "[t]he practical effect of such unrestricted dissemination could make it impossible for the offender to find housing or employment." *Kansas v. Myers*, 260 Kan. 669, 923 P.2d 1024, 1041 (1996).

The impact of these disclosures upon offenders' ability to find work is unquestionably an affirmative disability or restraint by any reasonable definition of these terms. Registrants' ability to work is impaired not only with respect to a single industry, *see Hudson*, 522 U.S. at 105; *De Veau*, 363 U.S. 144, but with respect to all possible means of support. The State's response – effectively, that any sanction short of imprisonment can never constitute an affirmative disability or restraint, State's Br. at 42 – is supported by neither logic nor precedent. Although the Court has frequently repeated the phrase from *Fleming* that the "infamous punishment of prison," *Fleming*, 363 U.S. at 617, is an example of an affirmative disability or restraint, *see, e.g., Hudson*, 522 U.S. at 104, its decisions make clear that other sanctions may constitute affirmative disabilities or restraints. *See Kennedy*, 372 U.S. at 170 (denaturalization); *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (same). *See also Cummings v. Missouri*, 4 Wall. 277 (1866) (loss of ability to work in any profession). So, here too, the impact of the notification provisions of the ASORA upon registrants' ability to maintain employment constitutes an affirmative disability or restraint.

Similarly, the notification provisions' exposure of registrants to myriad forms of discrimination, harassment, and physical danger in their homes and in their daily lives

constitutes an affirmative disability or restraint.[4] Even if such consequences do not materialize for every offender, all offenders must live with the constant threat of them, which in turn impairs their ability to become rehabilitated and reintegrated into society. *See E.B.*, 119 F.3d at 1102 (registrants "justifiably" live in fear of vigilantism); *Community Notification and Education* at 15. These forms of discrimination and harassment, and the threat of them, are additional disabilities imposed by the law. *See Trop*, 356 U.S. at 102 (the "fate of ever-increasing fear and distress" imposed by denaturalization is punitive, even if "all of the disastrous consequences of this fate may not be brought to bear" on a particular person).

Moreover, these disabilities are no less attributable to the ASORA because they require actions by third parties to have their full effect. *See Kennedy*, 372 U.S. at 160 ("grave practical consequences" of loss of citizenship rendered denationalization punitive). As the Court stated in *Cummings*, "the Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name." 4 Wall. at 324. *See also Weaver v. Graham*, 450 U.S. at 31 (quoting *Cummings*). "[W]e are not required to shut our eyes as judges to what we must all know as men." *Ross v. Massachusetts*, 414 U.S. 1080, 1085 (1973). *See also Culombe v. Connecticut*, 367 U.S. 568, 606 (1961);

[4] *See Community Notification and Education* at 13-14 (collecting instances of vigilantism as a consequence of notification); *E.B.*, 119 F.3d at 1102 (record demonstrated that registrants had lost employment and employment opportunities, and housing and housing opportunities, as a consequence of notification, and suffered retribution by private unlawful violence and threats). *See also Amicus Brief of the Public Defender of New Jersey* (documenting incidents of vigilantism against sex offenders in New Jersey since the inception of Megan's Law).

Watts v. Indiana, 338 U.S. 49, 52 (1949). It simply defies human experience, including the actual experience in the states that have implemented such laws, to suggest that putting comprehensive identifying information about sex offenders – including where they live, where they work, their physical descriptions, and their criminal histories – in the hands of the public will not cause the offenders to be shunned, put considerable pressure on their employers to let them go, and expose them to grave harm.

Accordingly, the disabilities imposed by the notification provisions of the ASORA are directly attributable to the law and, combined with the registration requirements, unmistakably impose an affirmative disability or restraint.

2. The Law Applies to Behavior That is Already a Crime.

Second, the law applies to behavior that is already a crime. *See Doe*, 259 F.3d at 991. A prerequisite to application of the ASORA is conviction for one of the criminal offenses set forth in the statute. Alaska Stat. § 12.63.100(5). The State and its *amici* do not contend otherwise. Thus, this *Kennedy* factor also weighs in favor of a punitive effect.

3. The Law Serves the Traditional Aims of Punishment.

Third, the Alaska law serves the traditional goals of punishment, *i.e.*, deterrence and retribution. As the Ninth Circuit held, "the threat of being subjected to mandatory registration and, particularly, publicly branded a sex offender, may presumably deter some persons who might otherwise become offenders." *Doe*, 259 F.3d at 990. It further held that the law, in particular its onerous registration requirements, was retributive. *Id.* at 990. The

State and its *amici* do not seriously contest that the statute has a deterrent effect, pointing out instead that measures frequently "'serve civil as well as criminal goals.'" State's Br. at 44 (quoting *Hudson*, 522 U.S. at 105); United States' Br. at 35 (same). While this is true, *see infra* at n.5, it does not change the fact that the factor provides additional support for the conclusion that the ASORA has a punitive effect.

4. The Law is Vastly Excessive in Relation to the State's Interest in Public Safety.

Fourth, the law is vastly excessive in relation to the State's asserted interest in public safety. *See Doe*, 259 F.3d at 991-93. While the ASORA is excessive in numerous respects, *see supra* at 4-5, two aspects of its excessiveness merit particular discussion. Those are the statute's subjection of all registrants to notification, regardless of their risk of re-offense or danger to the community, and its failure to limit notification in any way.

Again, the State does not seriously contend that the ASORA is not excessive. Nor could it. It subjects to registration and notification not only those offenders who may in fact pose a danger to public safety, but also those who plainly do not. The excessiveness of the ASORA in this regard is extraordinary; as the Court of Appeals recognized, "[w]ith one exception, every sex offender registration and notification law that has been upheld has tailored the provisions of the statute to the risk posed by the offender." 259 F.3d at 992. *See also Community Notification and Education* at 5-6 (at least eighteen states use risk assessment instruments or committees to assess an offender's level of notification, based upon the individual's

"similarities and differences from offenders known to have committed new sexual offenses").

All persons who have been convicted of a sex offense simply do not present the same risk of re-offense or pose the same threat to public safety. For example, respondent John Doe I, who had been adjudged by a court to have been successfully rehabilitated and was awarded custody of his minor daughter, plainly does not pose the same threat as a repeat, violent offender who has not been successfully rehabilitated. "Sex offenders are not a homogenous group; reoffense rates vary among different types of sex offenders and are related to specific characteristics of the offender and the offense." *Community Notification and Education* at 15. Thus, undifferentiated notification does not promote public safety; in fact, it undermines it because it distracts the public from concentrating on those offenders about whom they should be most concerned.

Similarly, the disclosure of the information contained in the State's registry without limitation is plainly excessive. Consistent with this common-sense proposition, until recently, most states did not seek to disclose the contents of their registries world-wide, as Alaska has elected from the outset. *See id.* at 8. Rather, the states limited disclosure to those in proximity to a particular offender or those inquiring about a specific offender, a proxy for a need for the information. *See Doe*, 259 F.3d at 993. Indeed, in distinguishing the Alaska law from the Washington registration and notification statute upheld in *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), the court of appeals found it significant that "the Washington statute authorized dissemination of information about any particular sex offender only within a 'narrow geographical area.'" *Doe*, 259 F.3d at 992 (quoting *Russell*, 124 F.3d at 1082).

As the court of appeals observed, the punitive effect caused by the ASORA's excessiveness lies in its unnecessary subjection of persons who are not a danger to the public to the statute's onerous registration requirements, and its unnecessary subjection of all registrants to "the unremitting social obloquy and ostracism" that accompanies "being publicly labeled a sex offender on Alaska's world-wide Internet website." *Doe*, 259 F.3d at 993. Similarly, in *Kansas v. Myers*, 923 P.2d at 1041, the Supreme Court of Kansas found that the excessiveness of unlimited public disclosure, even absent posting on the Internet, was the "key factor" in determining that the Kansas notification law was punitive. It explained:

> [the law] places no restrictions on who is given access to the registered offender information or what that person does with the information. The print or broadcast media could make it a practice of publishing the list as often as they chose. Anyone could distribute leaflets anywhere and anytime.

Id. Thus, the court concluded, even though the Kansas law did not provide for any affirmative notification, it "leaves open the probability that a registered sex offender could suffer [considerable] stigma and ostracism." *Id.*

That is even more true in this case, where Alaska has authorized disclosure of the information contained in its registry "for any purpose, to any person." Alaska Admin. Code. tit. 13 § 09.050(a). The State's failure to limit notification to those with a need for the information based upon public safety, or to limit the use of that information for public safety purposes, renders the statute vastly excessive. This excessiveness, in turn, strongly suggests that the legislature's motivation in enacting the ASORA was not to promote public safety, but, instead, was to appease an inflamed constituency that despised sex offenders, the

very situation against which the Ex Post Facto Clause guards.

Even in *Kansas v. Hendricks*, in which the Court upheld against a challenge under the Ex Post Facto Clause Kansas's civil confinement scheme for sex offenders, the Court paid close attention to the tailoring of the statute to its asserted remedial purposes. Critical to the Court's holding were the scheme's limitation to "a small segment of particularly dangerous offenders"; its "strict procedural safeguards"; its segregation of civilly confined offenders "from the general prison population"; its recommendation of "treatment if such is possible"; and its provision for the "immediate release" of an offender "upon a showing that the individual is no longer dangerous or mentally impaired." *Hendricks*, 521 U.S. at 368-69. *See also Kansas v. Crane*, 534 U.S. 407 (2002). No similar tailoring is present in the Alaska statute.

For purposes of the Ex Post Facto Clause, the excessiveness of a measure beyond its remedial purpose is the most significant *Kennedy* factor. A statute is more likely "'to reach the person, not the calling,'" *Fleming*, 363 U.S. at 616 (quoting *Cummings*, 4 Wall. at 320), when it imposes "excessive" disabilities that cannot be justified by the law's ostensibly non-punitive aims. Indeed, the United States agrees that the seventh *Kennedy* factor is deserving of special emphasis when deciding whether a measure violates the Ex Post Facto Clause. As the United States acknowledges, by focusing on the fit between means and ends, the seventh *Kennedy* factor plays a critical role in exposing those measures that are "animated by 'ambition, or personal resentment, and vindictive malice' that target particular individuals for punishment." Br. of the United States at 20 (quoting *Calder*, 3 U.S. (3 Wall.) at 389). Conversely, "where legislation broadly advances a legitimate, identifiable regulatory purpose and its terms are

reasonably tailored to achieve that purpose, such legislative abuses are exceedingly unlikely." Br. of the United States at 21.[5]

This Court has recognized as much. In its seminal Ex Post Facto cases, the Court has based its decisions in significant part on the fit between a measure that the legislature had labeled as civil and its putative regulatory aims. For example, in *Fleming*, the Court upheld a statute terminating Social Security benefits to the vast majority of deported aliens because it found the statute to be reasonably tailored to the government's interest in regulating the Social Security program. Similarly, in *De Veau v. Braisted*, 363 U.S. 144 (1969), the Court found the disqualification of felons from working in the New York shipyards to be

[5] Recognizing the need for the Court to accord priority to certain of the *Kennedy* factors, the State and its *amici* have urged the Court to emphasize factors of their selection. Alaska and *amici curiae* the State Attorneys General urge the Court to place emphasis solely on the sixth factor, whether there is an alternative, non-punitive purpose to which the measure may be rationally connected. State's Br. at 33; State Attorneys General's Br. at 14. This is inappropriate for two reasons. To begin, the first prong of the *Ward* "intents-effects" test already takes into account the non-remedial purpose expressed by the legislature. *See Doe*, 259 F.3d at 985 n.5 (although the second prong of the "intents-effects" test includes an inquiry into the legislature's purpose, that purpose is "necessarily considered in the examination conducted under the first prong (the intent prong) of the test"). Thus, emphasizing the sixth *Kennedy* factor alone would render the second prong of the *Ward* test redundant and extraneous. Second, a measure will rarely be enacted that cannot be connected to some non-punitive purpose. *See Hudson*, 522 U.S. at 102 (sanctions frequently serve "civil as well as criminal goals"); *Ursery*, 518 U.S. at 292 (same). Thus, emphasizing only the sixth factor would render the Ex Post Facto Clause toothless, affording protection against only the least wily of legislatures. To the degree that the United States also places special emphasis on the sixth factor, Br. of the United States at 21, its analysis is similarly flawed.

reasonably tailored to the state's interest in promoting safety in the shipyard industry. But in *Cummings v. Missouri*, 4 Wall. 277, 319, the Court struck down a state constitutional amendment conditioning the holding of any state office or the practice of any profession on the swearing of an oath of past loyalty of the United States, because the Court found that the oath was excessive in relation to any possible qualifications relating to the fitness or capacity of persons for the offices or professions to which it applied. For the same reasons, in *Ex Parte Garland*, 4 Wall. 333, 380 (1866), the Court struck down a federal law requiring a similar oath of loyalty to the United States as a condition of practicing law. Explaining its holdings in these cases, the Court observed that it has rejected ex post facto challenges when "the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession." *De Veau*, 363 U.S. at 160. By contrast, it has struck down as violating the Ex Post Facto Clause restrictions that were not reasonably related to the regulation of any present activity. *See Cummings*, 4 Wall. at 320; *Garland*, 4 Wall. at 382.

Thus, although no one *Kennedy* factor is dispositive, *see Hudson*, 522 U.S. at 101, for purposes of the Ex Post Facto Clause a determination that a measure is vastly excessive in relation to its non-punitive goals should be sufficient when combined with other factors to require the conclusion that the measure has a punitive effect. *See Hudson*, 522 U.S. at 111 (Stevens, J., concurring) (excessiveness "should be capable of tipping the balance in

extreme cases").[6] As the court of appeals held, those are precisely the circumstances presented here.

B. The Remaining Factors Do Not Outweigh the Four Factors Supporting a Punitive Intent or Effect.

The Ninth Circuit found that the three remaining *Kennedy* factors do not support the conclusion that the Alaska law is punitive. These are that the ASORA does not impose sanctions that have historically been considered punishment; is not imposed solely upon a finding of scienter; and can rationally be viewed as advancing a non-punitive purpose. *See Doe*, 259 F.3d at 994.

The Ninth Circuit correctly held that these factors should not be afforded controlling weight. *See Kansas v. Myers*, 923 P.2d at 1040-43 (skipping these factors as "add[ing] little, if anything, to the [Ex Post Facto] analysis"). First, whether the ASORA imposes sanctions historically regarded as punishment is far from clear: although

[6] Of course, different factors may be more significant in contexts involving the Fifth, Sixth, and Eighth Amendments. It is not necessarily the case that a measure that is punitive for purposes of the Ex Post Facto Clause is also punitive for purposes of all other relevant constitutional provisions. *See Hendricks*, 521 U.S. at 394-95 (Breyer, J., dissenting) (Court still has not devised "a single formula" for identifying those measures that must be "constitutional[ly] characteriz[ed] as punishment") (internal quotation marks and citations omitted). *See also* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 Geo. L. J. 775, 798 (1997) ("In a growing number of cases . . . the Supreme Court has concluded that some state actions may be 'punitive' only for the purpose of invoking one or another procedural protection."). Since the only provision at issue is the Ex Post Facto Clause, the Court need not here decide how the analysis would be different, if at all, for purposes of other provisions of the Constitution.

there is admittedly no precise historical equivalent to the ASORA, its notification provisions at least approach the historical punishments of shaming and branding. *See E.B.*, 119 F.3d at 1115-19 (Becker, J., concurring in part and dissenting in part).

Second, whether the measure applies solely upon a finding of scienter is not particularly probative. As the court of appeals observed, the great majority of crimes that subject a person to the Alaska law require scienter. The only exceptions are a few "strict liability" offenses such as statutory rape, deemed to be so harmful that the law effectively assumes scienter. *See Doe*, 259 F.3d at 989. Thus, although the ASORA does not apply *only* upon a finding of scienter, it overwhelmingly applies where scienter has been found – a fact which undermines the weight that should be afforded this factor as well. *Cf. Hendricks*, 521 U.S. at 352, 382 (in addition to those convicted of an offense requiring scienter, civil commitment scheme applied to persons charged with a sexually violent offense but found incompetent to stand trial, and those found "not guilty" because of a mental disease or defect).

Third and finally, whether the measure can be rationally connected to a remedial purpose should not be afforded significant weight. As noted *supra* at n.5, the legislature's characterization of a measure as civil is already afforded significant deference under the first prong of the *Hudson-Ward* analysis. In addition, there will nearly always be a non-punitive purpose that can be advanced in support of a measure. Thus, the State's ability to articulate a non-punitive purpose served by the ASORA is far less revealing than, for example, whether the state's chosen means are, as here, vastly excessive in relation to whatever non-punitive purpose is asserted.

In sum, four of the seven *Kennedy* factors support the conclusion that the ASORA is punitive. Taken together, these factors unmistakably provide the "clearest proof" necessary to require a determination that the law is punitive. And the remaining *Kennedy* factors, even assuming they fall in favor of the State, are plainly insufficient to alter that conclusion.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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